**Moss Point School District**
**Request for Arbitration of Denial of Public Assistance Funding for**
**Replacement of Magnolia Junior High School**
**Project Worksheets: 8074, 8254**
**FEMA-1604-DR-MS**
**Docket # CBCA 1800-FEMA**

## RESPONSE OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY TO ARBITRATION REQUEST OF MOSS POINT SCHOOL DISTRICT, MS

On November 19, 2009, the Federal Emergency Management Agency ("FEMA") received Moss Point School District's ("Applicant" or "District") request to arbitrate FEMA's July 17, 2008 final administrative decision, which denied Public Assistance funding for the full replacement costs of Magnolia Junior High School ( "School") and the adjacent cafeteria. This document, with exhibits, constitutes FEMA's response to the Applicant's arbitration request.

## ARBITRATION PANEL JURISDICTION

The Arbitration panel does not have jurisdiction over the Applicant's request because the Applicant has failed to meet the statutory and regulatory requirements to arbitrate a claim as provided for in the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164-166 (2009) and in Title 44 of the Code of Federal Regulations (C.F.R.) § 206.209. Specifically:

- FEMA made a final administrative decision on the issue under dispute in Applicant's arbitration request and transmitted that decision to the State of Mississippi ("Grantee"), through its Mississippi Emergency Management Agency, on July 17, 2008. See Exhibit 1. Regulatory requirements provide that if an applicant received a final agency decision before February 17, 2009, its claim is not eligible for arbitration. In other words, the Applicant's request is *prima*

*facie* ineligible for arbitration because it does not meet the regulatory time limitation set forth in 44 C.F.R. § 206.209(d)(2).

## SUMMARY OF FEMA'S POSITION

*Jurisdiction*

FEMA restates that the matter brought to this Panel at the request of the Applicant is not eligible for arbitration. 44 C.F.R. § 206.209(d)(2). Under this regulation, there is only one exception for allowing arbitration as to matters that have been previously decided on second appeal. If FEMA made a decision on second appeal on or after February 17, 2009 – the date on which the American Recovery and Reinvestment Act of 2009 became law – then arbitration is available to the Applicant. See Id. The issues raised in the Applicant's request for arbitration were decided by FEMA on second appeal on July 17, 2008, which is seven months before the effective date of this arbitration process. See Exhibit 1. Therefore, there is no issue before this Panel that is eligible for arbitration.

*The Merits of the Case*

FEMA submits a full response as to the merits of the Applicant's Request so to preserve the right to contribute to the administrative record should this Panel allow the Applicant to arbitrate this matter.

Following Hurricane Katrina, Applicant transferred all Magnolia Junior High School students to another junior high school and did not make any repairs to the School. The Applicant's work on the School was limited to cleaning, disinfecting, and remediating mold in the buildings immediately after the storm. FEMA reimbursed the Applicant for

Public Assistance ("PA") Category B -- Emergency Protective Measures -- costs in the amount of $982,737 under PW 4649. See Exhibit 4.

Applicant asked FEMA to prepare Project Worksheets (PW) to document disaster damage and related cost estimates for repairs to the School and adjacent cafeteria. As requested, FEMA prepared two PWs: i) PW 8074 for damage to the School with an estimated repair cost of $1,688,076; and ii) PW 8254 for damage to the cafeteria with estimated repair costs of $122,376. See Exhibits 2 and 3. FEMA concluded that the Applicant was eligible for assistance to repair both facilities, but that the School and cafeteria damage did not meet the regulatory threshold established in 44 C.F.R. § 206.226(f) for full replacement costs. This regulation and the related FEMA policy specify that facilities are eligible for full replacement when repair costs for a facility equal or exceed 50 percent of the replacement costs. See Exhibit 5. The PW estimate to repair the School equates to 26 percent replacement cost and the estimate to repair the cafeteria equates to 29 percent of replacement cost. Response and Recovery Directorate Policy 9524.4, *Eligibility of Facilities for Replacement under 44 CFR 206.226(d)(1), dated September 24, 1998,* provides specific guidelines for determining the repair versus replacement calculation, known as "The 50% Rule." See Exhibit 5. When FEMA applied the 50% Rule to Applicant's facilities, the ratio of repair cost to replacement cost was well below 50 percent for each facility. See Exhibits 2 and 3. Therefore, FEMA concluded that the School and the cafeteria are eligible for repair costs only, and not full replacement costs. Id.

The Applicant disputes FEMA's calculations on two grounds. First, Applicant claims that reimbursed costs associated with emergency protective measures under PW 4649 should have been included in the calculations to determine repair versus replacement costs. See Applicant's Request at pg. 2. Second, the Applicant claims that costs related to code upgrades mandated by a local municipal ordinance should also have been included in the 50% Rule calculation. Id. Both positions are untenable under applicable law. See 44 C.F.R. §206.226(f).

Pursuant to FEMA policy, neither emergency work nor code upgrades may not be included in the 50% Rule calculation. This is because this calculation is limited to restoration of damaged facilities to their ***pre-disaster*** conditions, *i.e.,* the same condition the building or structure was in before the flood. See 44 CFR §206.226(f). Likewise, the numerator in the 50% Rule calculation, i.e., repair costs, cannot include local building code requirements. In accordance with law and policy, FEMA cannot include costs related to emergency protective measures, *i.e.* mold remediation and disinfection and local building code requirements, in the 50% Rule calculation. See Exhibits 6 and Exhibit 7 at 29.

In 2009, the Applicant added a substantial number of improvements to its buildings in its redesigned plans. See Applicant's Request at p. 3. These improvements in the Applicant's reconstruction plans significantly increased the estimated repair costs FEMA had previously determined to be eligible for FEMA Public Assistance grant funding in

July 2008. Id. Under the law, FEMA cannot assume these additional costs.[1] An Applicant's improved project would be capped at eligible costs to repair damage to restore the facility to its pre-disaster condition. Therefore, improvements cannot be funded nor can the improvement be part of a 50% Rule calculation. See 44 C.F.R. §206.203(d)(1).

FEMA's position is that eligible repair costs for Applicant's facilities do not equal or exceed 50 percent of the eligible replacement cost of the facility. See 44 C.F.R. § 206.226. Furthermore, substantial improvements made to the buildings beyond the original scope of work for each PW is not eligible for FEMA Public Assistance funding and the Applicant is not eligible for Public Assistance funding for replacement of these facilities. Therefore, the Applicant is eligible only for the costs to repair each facility.

[1] Applicant has acknowledged that these additional costs are its responsibility. Nevertheless, Applicant appears to want to pass some of those additional costs resulting from the redesigned School and cafeteria to FEMA. Applicant has had problems complying with a local floodplain ordinance as a result of the proposed improvements. Applicant can only comply with the ordinance if it can obtain a building permit from the City of Moss Point. Applicant's Request at 1.3. The ordinance requires any new construction or reconstruction of a ***substantially improved facility*** to be flood-proofed or elevated. Applicant has determined that flood-proofing or elevating the School and cafeteria would be "impractical" or "cost prohibitive" to Applicant. Id at p.3. In an attempt to pass some of these costs on to FEMA, Applicant has asked FEMA to provide Public Assistance funding for replacement cost for the School and cafeteria on three separate occasions. Id at p. 1.3.Each time, FEMA has denied the request based on FEMA policy and guidance.

## BACKGROUND

FEMA, a component agency of the United States Department of Homeland Security, is responsible for, among other duties, administering and coordinating the Federal governmental response to Presidentially-declared major disasters pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).[2] See 42 U.S.C. §§ 5121 *et seq.* The Stafford Act is triggered when, at the request of the Governor of a state, the President declares an affected area to be a "major disaster." See 42 U.S.C. § 5170; 44 C.F.R. §§ 206.36; 206.38. When a major disaster is declared, the President determines the type of discretionary assistance that may be made available in the area he has determined is encompassed by the incident – the "declared area." See 42 U.S.C. § 5170a.

### The Declaration

On August 29, 2005, the President issued a major disaster declaration for the State of Mississippi as a result of Hurricane Katrina pursuant to his authority under the Stafford Act. See 42 U.S.C. § 5170. This declaration under the Stafford Act authorized all categories of Public Assistance, including emergency work and restoration of eligible facilities. See Exhibit 9. The State of Mississippi is the Grantee for all FEMA Public Assistance delivered in the State. See 44 C.F.R. §206.201(e). Moss Point School District is a subgrantee of the State of Mississippi. See 44 C.F.R. §206.201(l).

[2] The Stafford Act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. See 42 U.S.C. § 5164.

The President's declaration enabled Moss Point School District to apply for FEMA Public Assistance reimbursement for eligible emergency work and permanent repair, restoration, and replacement of eligible facilities. Emergency work includes measures, such as mold remediation and debris removal that are necessary to eliminate immediate threats to life and property. See 42 U.S.C. §5170b; 44 C.F.R. §206.225. Restoration of eligible facilities includes the repair of a facility to its function immediately prior to the major disaster. An Applicant may also apply for funding to replace or relocate a facility, or for an alternate or improved project. See 42 U.S.C. §5172; 44 C.F.R. §206.226.

The Stafford Act states that FEMA "may make contributions" for the repair, restoration, and replacement of damaged facilities. See 42 U.S.C §5172. The PA program allows FEMA, in its discretion, to provide disaster assistance to states, local governments, and certain private non-profit organizations if FEMA determines that the Applicant, facility, and work meet eligibility requirements. See 44 C.F.R §§206.200-.206.

PA funding may be provided in the form of grants for the state or local government's own recovery efforts, or FEMA may fund direct federal assistance through which a federal agency performs the recovery work. See 44 C.F.R §206.203 and 44 C.F.R. §206.208, respectively. FEMA may also fund eligible private nonprofit facilities, such as educational facilities or schools, through a subgrantee. See 44 C.F.R. §206.223(b).

To receive PA, the Applicant must own an eligible facility and meet the work eligibility requirements set forth in FEMA regulations. Specifically, the item of work must be required as a result of the major disaster; the facility must be located within the disaster-

declared area; and the facility must be the legal responsibility of the eligible Applicant. See 42 U.S.C. §5122; 44 C.F.R. §§206.221-.223; 206.226(c)(1). Under the PA program, a federal inspection team accompanied by a local representative surveys the damage and estimates the scope and cost of necessary repairs. See 44 C.F.R. §206.202(d). The inspectors record the information they gather on Project Worksheets. Id. PWs document damage caused by the disaster and list, among other information, the scope and "quantitative estimate for the eligible work." Id.

FEMA reviews PWs after they are completed in order to determine whether to approve funding for eligible work. Id. Thereafter, FEMA may make Federal disaster assistance funds available (*i.e.*, "obligate") based on the final PW. See 44 C.F.R. §206.202(e). A PW is not a contract between FEMA and the Grantee and/or subgrantee to pay Federal disaster assistance and does not create any right of the Grantee or subgrantee to receive any such Federal funds. See 44 C.F.R. §206.202(d). A PW only provides a cost estimate and scope of work based upon the engineering analysis and on-site investigation of disaster-caused damage. See 44 C.F.R. §206.202(e); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635 (3rd Cir. 1998)(providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States).

**Appeals and Arbitration**

The Stafford Act authorizes appeals of PA eligibility decisions. See 42 U.S.C. § 5189a. There are two levels of appeal -- the first to the Regional Administrator, and the second to the Assistant Administrator for the Disaster Assistance Directorate. See 44 C.F.R. §

206.206(b). Pursuant to a provision of the ARRA, an Applicant may avail itself of arbitration in lieu of a final administrative decision under the PA program for award determinations related to Hurricanes Katrina and Rita. See 44 C.F.R §206.209. A decision of a majority of this Panel will constitute the final decision, binding on all parties, and is not subject to judicial review, except as permitted by 9 U.S.C. §10. See 44 C.F.R. §206.209(k)(30).

**Applicant's School and Cafeteria Project**

On August 29, 2005, the Applicant's campuses and buildings were damaged by Hurricane Katrina. To enable the Applicant to remove debris, clean and repair disaster-related damage to the Applicant's buildings, and replace textbooks and other school contents, FEMA prepared a total 73 PWs and approved $12,790,135 in eligible work. See Exhibit 11.

This arbitration request concerns the School, which consists of two buildings: a one-story 78,456 square foot (SF) four-wing main building with classrooms, administrative offices, a gym and library; and a detached one-story 5,100 SF cafeteria. As a result of the damage to the School, the Applicant transferred all students to another Junior High School in the District.

In September 2005, the Applicant retained a safety inspector, who inspected both the School and cafeteria and concluded that both buildings had "retained their structural integrity." See Exhibit 12. After the inspection, the Applicant hired a contractor to perform emergency remediation services to clean the school and eliminate mold in the

buildings. See Applicant's Request at pp. 4-5. FEMA then prepared PW 4649 to document eligible work. FEMA reimbursed Applicant's contract costs for this eligible work in the amount of $982,737. See Exhibit 4.

Thereafter, FEMA prepared PW 8074 and PW 8254 to document eligible damage and estimated repair costs for the School and cafeteria. See Exhibits 2 and 3. The estimated repair cost for the School in PW 8074 totaled $1,688,076; and the estimated repair cost for the cafeteria in PW 8254 totaled $122,376. Id. The Applicant then asked FEMA to reassess these facilities because it claimed that both PWs were wrong and that both facilities should have been eligible for replacement costs rather than repair costs. See Applicant's Request at pp. 12-13.

To resolve the dispute, a joint FEMA-Grantee team reassessed the two buildings. Applying the "50% Rule," the joint team concluded that neither building was eligible for full replacement assistance. See Exhibits 2 and 3. The joint team's finding are consistent with 44 C.F.R. § 206.226 (f), *Repair vs. Replacement,* which states "[a] facility is considered repairable when disaster damages[sic]do not exceed 50 percent of the cost of replacing a facility to its pre-disaster condition…." The findings are also consistent with FEMA Response and Recovery Directorate Policy 9524.4, dated September 24, 1998, which provides guidance on the application of Federal regulation 44 C.F.R. § 206.226, including the calculation used to determine whether an Applicant can receive the costs to replace a facility. See Exhibit 5.

Based on this regulation and policy, FEMA calculated a repair vs. replacement fraction for each facility using RS Means 2006 Costworks to develop an estimate of eligible replacement costs. As to the School, the cost to repair the facility was 26 percent of the cost to replace the facility. The calculation would be expressed as follows: $1,688,076 [repair costs] divided by $6,547,153 [replacement costs] = 26 percent. As to the cafeteria, the cost to repair the facility was 29 percent of the cost to replace the facility. The calculation would be expressed as follows: $122,376 [repair costs] divided by $425,595 [replacement costs] = 29 percent. Calculations for both facilities are below the 50 percent replacement eligibility threshold.

The Applicant appealed these determinations in 2007. During the appeal process, FEMA increased the eligible scope of work for the School and cafeteria with the replacement of electrical, heating, air conditioning, and ventilating systems, as well as an intercom system. This additional eligible work added $649,492 to the eligible costs in PW 8074 and $81,663 to eligible costs in PW 8254. FEMA also adjusted the cost-per-square-foot-calculation to bring estimates of replacement cost in line with RS Means Costworks - Square Foot Models and local bid prices. These revisions increased the eligible repairs costs for PW 8704 to $2,337,568 and increased eligible repair costs for PW 825 to $215,586. After these adjustments, the 50% Rule calculation was again applied. The repair versus replacement cost ratio for the School increased to 33 percent and for the cafeteria the repair versus replacement cost ratio for the cafeteria costs were increased to 34 percent. Despite those increased eligible costs, the cost estimates still remained well below the 50% Rule threshold for full replacement eligibility.

## PROCEDURAL HISTORY

### First Appeal

In accordance with the time limits established in 44 C.F.R. §206.206, APPLICANT filed a timely appeal of PW 8074 and PW 8254 on August 29, 2006. See Exhibits 15 and 16. On July 19, 2007, the FEMA Regional Administrator denied the Applicant's first appeal. After the appeal was filed, FEMA, the Grantee, and the Applicant continued to work informally to resolve the dispute, but could not reach an agreement. The Applicant then re-submitted its appeal of PWs 8074 and 8254 with the Grantee on March 12, 2007, and the Grantee submitted the appeal to FEMA on April 17, 2007. See Applicant's Request at pg. 1-3. FEMA denied the first appeal on July 19, 2007. See Exhibit 14.

### Second Appeal

Pursuant to 44 C.F.R. § 206.206, the Applicant had 60 days to file a second appeal, but it failed to do so within that timeframe. See Arbitration Request at pg. 3. The Applicant timely filed its second appeal with the Grantee on September 26, 2007. On July 17, 2008, FEMA formally denied the Applicant's second appeal. See Exhibit 1.

### Request for Arbitration

On November 16, 2009, the Applicant filed this Request for Arbitration seeking the replacement costs for its School and cafeteria. Pursuant to 44 C.F.R. § 206.209(d)(2), the Applicant request for arbitration is outside the jurisdiction of this Panel because the matter was previously decided on second appeal prior to February 17, 2009.

Furthermore, the Applicant seeks financial assistance from FEMA for a project (replacement of buildings) that would allow it to obtain a local building permit because its planned improvements prevent it from being in compliance with local floodplain ordinances. See Applicant's Request at pg. 3. FEMA cannot legally do this because the School and cafeteria are not eligible, under the law, for replacement costs. Nor can FEMA provide this financial assistance to accommodate the Applicant so that it can rebuild the school in compliance with these local regulations.

## DISCUSSION AND ANALYSIS

### 1. Applicant's Request for Arbitration Must be Dismissed on Jurisdictional Grounds under 44 C.F.R. § 206.209(d)(2).

The Arbitration Panel does not have jurisdiction over the District's request to arbitrate because the Applicant received a final agency decision from FEMA seven months before the date established for arbitrating disputes under the Public Assistance program. The Panel's jurisdiction for matters in which a final agency action was rendered is February 17, 2009. See 44 C.F.R. §206.209(d)(2). FEMA's final agency action was its decision on second appeal dated July 17, 2008. See 44 C.F.R. §206.206(d)(3). Therefore, FEMA's final agency decision preceded the effective date of the arbitration program and is outside this Panel's jurisdiction.

### 2. The Applicant fails to establish that the School and cafeteria are eligible for FEMA Public Assistance replacement costs.

The Applicant claims that the School and cafeteria are eligible for replacement costs. However, the District's position is wholly inconsistent with the law and relevant policy.

FEMA applies the 50% Rule calculation to permanent work only. See 44 C.F.R. § 206.226(f). These calculations cannot include work performed under Category B-Emergency Protective Measures. See Exhibit 6. Further, FEMA's policy clearly states that building code upgrades not associated with damaged building components are not to be included in repair costs for 50 percent rule calculations. See Exhibits 5 and 7 at p. 29.

Pursuant to 44 C.F.R. § 206.226, FEMA may provide funding to replace the facility only if the costs to repair the facility equal or exceed 50 percent of the costs to replace the facility. In this case, a joint team consisting of FEMA and the Grantee found that the cost to repair the School would be 33 percent of the cost to replace the facility and the cost to repair the cafeteria would be 34 percent of the cost to replace the building. Based on this calculation – applied according to FEMA policy -- the Applicant is not entitled to full replacement costs for the facilities.

The Applicant has decided to make substantial improvements to the facilities, which will change the footprint and increase the capacity of the buildings. Pursuant to 44 C.F.R. §206.203(d)(1), an applicant would be required to obtain the Grantee's approval when improvements are desired for a facility. Such a project would be considered an "improved project." As such, the PA funding would be capped at the eligible cost to repair the facility to its pre-disaster condition. See Id; and Exhibit 13. Costs related to these improvements cannot be included in the 50% Rule calculation to determine if the Applicant would be eligible for the costs to replace the facility. See Exhibits 5 and 6. By definition, Federal funding for improved projects is capped at estimated costs of repairing

the damaged facility to its ***pre-disaster design***. The Applicant cannot receive FEMA funding for the costs of substantial improvements beyond that capped amount.

The Applicant now claims that its design improvements, undertaken at its own expense, have caused it to be subject to a local floodplain ordinance, which is derived from 44 C.F.R. Part 60 Subpart A – Requirements for Flood Plain Management Regulations. See Exhibit 17. In the Applicant's view, this means that FEMA should bear some of the costs of the improvements since the School is located within a Special Flood Hazard Area and all new construction or substantial improvements to existing facilities must be elevated above the base flood level or flood-proofed. The Applicant asserts that both buildings are below the new base flood elevation requirements issued by FEMA in March 2008; however, correspondence from the City of Moss Point Building Office states that the intended repairs to the buildings "would be a substantial improvement." Therefore, the Applicant is required to elevate or flood-proof the buildings. As a consequence of the local ordinance, the Applicant is unable to obtain a local building permit.

Federal regulations at 44 C.F.R. § 9.4 define "substantial improvement" as

> any repair, reconstruction, or other improvement of a structure or facility, which has been damaged in excess of, or the cost of which equals or exceeds, 50 percent of the market value of the structure or replacement cost of the facility (including all "public facilities" as defined in the Disaster Relief Act of 1974) (a) before the repair or improvement is started, or (b) if the structure or facility has been damaged and is proposed to be restored, before the damage occurred.

Although the Applicant's arbitration request provides no reference to an amount in dispute, an architect's estimate was provided with the request, and it stated that reconstruction of the buildings using the redesigned plans will cost approximately $9.7 million. This is substantially higher than FEMA's PA grant for repair costs for the School and the cafeteria, which are estimated to be $2,553,154 as contained in FEMA's final agency decision returned in July 2008. Consequently, by adding substantial improvements to the scopes of work eligible for FEMA grant funding, the Applicant is solely responsible for its failure to obtain a local building permit.

In summary, the Applicant's request for replacement costs is not eligible for Public Assistance funding because the eligible repair costs did not exceed 50 percent of the eligible replacement cost of the facilities. In addition, the Applicant is not eligible for FEMA Public Assistance for the costs of improvements beyond the capped amount of estimated costs of repairing the damaged facility to its pre-disaster design.

## CONCLUSION AND RECOMMENDATION

The Applicant is not eligible for arbitration because its request for arbitration fails to meet the regulatory timeframe provided in 44 C.F.R. §206.209(d)(2). This matter was the subject of a final agency decision on second appeal made by FEMA in June 2008. This was some seven months before the effective date of this Public Assistance arbitration process. In addition, if this matter were arbitrable, the Applicant is not eligible under the Public Assistance grant program for additional FEMA reimbursement for the costs associated with the full replacement of the School and cafeteria. FEMA determined that the eligible repair costs for the Applicant's facilities did not equal or exceed 50 percent of the eligible replacement cost of the facilities.

Therefore, FEMA respectfully recommends that the Panel find that it does not have jurisdiction to make a decision in this matter and that the Applicant's request is ineligible for arbitration. In the alternative, FEMA asks for a finding in its favor and deny the Applicant's request for additional Public Assistance funding.

Respectfully submitted on this 19th day of December, 2009 by

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